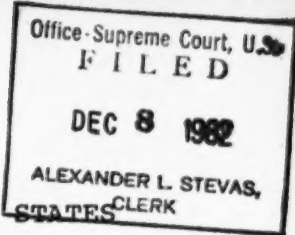


82-962



IN THE SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM 1982

No. \_\_\_\_\_

PATSY M. THOMAS and )  
GREGORY RANDALL THOMAS, )  
By and Through his Mother) )  
and Next Friend, PATSY M.) )  
THOMAS, ) )  
 ) )  
Petitioners, ) )  
 ) )  
v. ) )  
 ) )  
UNITED STATES OF AMERICA,) )  
 ) )  
Respondent. ) )

ON WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF CLAIMS

\*\*\*\*\*

PETITION FOR WRIT OF CERTIORARI

\*\*\*\*\*

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Counsel for Petitioners

IN THE SUPREME COURT OF THE UNITED STATES  
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GREGORY RANDALL THOMAS,            )  
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THOMAS,                                )  
  )  
          Petitioners,                    )  
  )  
                          v.                )  
  )  
UNITED STATES OF AMERICA,)        )  
  )  
          Respondent.                    )

ON WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF CLAIMS

The petitioners, Patsy M. Thomas and Gregory Randall Thomas, pray that a writ of certiorari issue to review the judgment made by the United States Court of Claims, entered September 10, 1982, which granted the respondent's motion for summary judgment against the petitioners.

QUESTIONS PRESENTED

I. Whether the petitioners' property rights were taken without just compensation in

violation of the Fifth Amendment to the United States Constitution when the United States removed and hid the petitioner's husband and father so that petitioners were deprived of and continue to be deprived of support from said husband and father?

II. Whether the actions of the United States unconstitutionally interfered with the plenary authority of North Carolina over domestic matters in violation of the Ninth and Tenth Amendments to the Constitution?

III. Whether the United States is immune from suit under Section 502 of Public Law 91-452?

IV. Whether the petitioners were deprived of due process of law when the Court of Claims decided the issues in this case without allowing the petitioners to conduct any discovery?

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## OPINION BELOW

The Opinion of the United States Court of Claims is appended to this Petition.

## JURISDICTION

The judgment of the United States Court of Claims granting respondent's motion for summary judgment was made and entered September 10, 1982. The jurisdiction of this Court is invoked pursuant to 28 U.S.C.A. §1255. That jurisdictional Section was repealed effective October 1, 1982, pursuant to Section 502 of Public Law 97-164. However, since a final order had been entered in this case prior to October 1, 1982, appeal from the decision of the United States Court of Claims was by petition for certiorari pursuant to 28 U.S.C.A. §1255 at that time and therefore jurisdiction for this Petition for Certiorari is still appropriate under 28 U.S.C.A. §1255.



CONSTITUTIONAL AND STATUTORY  
PROVISIONS INVOLVED

CONSTITUTION OF THE UNITED STATES:

AMENDMENT V.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT IX.

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

## AMENDMENT X.

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

SECTIONS 501-504 of Public Law 91-452.

### TITLE V - PROTECTED FACILITIES FOR HOUSING GOVERNMENT WITNESSES

Sec. 501. The Attorney General of the United States is authorized to provide for the security of Government witnesses, potential Government witnesses, and the families of Government witnesses and potential Government witnesses in legal proceedings against any person alleged to have participated in an organized criminal activity.

Sec. 502. The Attorney General of the United States is authorized to rent, purchase, modify, or remodel protected housing facilities and to otherwise offer to provide for the health, safety and welfare of

Sec. 502. The Attorney General of the United States is authorized to rent, purchase, modify, or remodel protected housing facilities and to otherwise offer to provide for the health, safety and welfare of witnesses and persons intended to be called as Government witnesses, and the families of witnesses and persons intended to be called as Government witnesses in legal proceedings instituted against any person alleged to have participated in an organized criminal activity whenever, in his judgment, testimony from, or a willingness to testify by, such a witness would place his life or person, or the life or person of a member of his family or household, in jeopardy. Any person availing himself of an offer by the Attorney General to use such facilities may continue to use such facilities for as long as the Attorney General determines the jeopardy to his life or person continues.

Sec. 503. As used in this title, "Government" means the United States, any State, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, any political subdivision, or any department, agency, or instrumentality thereof. The offer of facilities to witnesses may be conditioned by the Attorney General upon reimbursement in whole or in part to the United States by

any State or any political subdivision, or any department, agency or instrumentality thereof of the cost of maintaining and protecting such witnesses.

Sec. 504. There is hereby authorized to be appropriated from time to time such funds as are necessary to carry out the provisions of this title.

#### STATEMENT OF THE CASE

Petitioner, Patsy Thomas, is the wife of William R. Thomas and petitioner Gregory Thomas is the son of William R. Thomas. On June 16, 1974, Mr. & Mrs. Thomas separated and on July 25, 1974, they entered into a separation agreement, however, there has been no divorce. Under the separation agreement, William R. Thomas agreed to pay the sum of \$150.00 per month to Patsy Thomas for the support of Gregory Thomas. Those payments were to increase by 20% each succeeding year under certain circumstances. William R. Thomas made support payments to Patsy Thomas until May, 1975.

In May, 1975, Patsy and Gregory Thomas lost all contact with William R. Thomas. This had occurred on previous occasions and Mrs. Thomas had, with the help of the Greensboro Police Department, been able to locate Mr. Thomas. In May, 1975, she again contacted the Greensboro Police Department in an attempt to have William R. Thomas located. However, the Greensboro Police Department notified Mrs. Thomas that they did not know the location of Mr. Thomas at that time. This was apparently untrue as William Thomas later testified in the trial of United States v. Beaver in August, 1976, that he had been working as an informant and undercover agent with the Greensboro Police Department since January, 1975. Mrs. Thomas also attempted to locate her husband through several other sources but was unsuccessful. Because of Mr. Thomas' failure to provide support the petitioners became destitute.

Mrs. Thomas assumed that her husband was deceased and in 1981, she filed an application to get survivors benefits for her son from the Social Security Administration. As part of that application she was required to obtain certain documents from the Police Department and from Mr. Thomas' former employer showing when Mr. Thomas had last been seen. In carrying out these steps, Mrs. Thomas heard for the first time that Mr. Thomas had been placed in the protective custody by the United States Government, that he had testified at several criminal trials in the United States District Court for the Middle District of North Carolina, and that following his testimony he had been placed in the Witness Protection Program (hereinafter WPP). Mrs. Thomas attempted to confirm with the United States Marshal's Service that Mr. Thomas had been placed in the WPP. In a letter dated July 7, 1981, the United States

Marshal's Service denied that Mr. Thomas had been placed in the WPP. However, after talking with an FBI agent who assured Mrs. Thomas that Mr. Thomas had been placed in the WPP, Mrs. Thomas again contacted the United States Marshal's Service and notified them that she had information from an FBI agent that indicated that Mr. Thomas had been placed in the WPP. At this point, the United States Marshal's Service notified Mrs. Thomas that the Privacy Act prevented the Marshal's Service from giving Mrs. Thomas any information concerning Mr. Thomas.

After this action was commenced by the petitioners, the United States has now admitted that Mr. Thomas was placed in the WPP, was relocated from North Carolina and was given a new identity.

While the respondent contends that Mr. Thomas was not authorized for participation in the WPP until September, 1976, it appears

from the testimony of Mr. Thomas at the trial in United States v. Kenneth A. Beaver, tried in the United States District Court for the Middle District of North Carolina in August, 1976, that Mr. Thomas had been working as an informant and undercover agent for the United States and the Greensboro Police Department since January, 1975. It further appeared that in May, 1975, Mr. Thomas was relocated by the respondent to Los Angeles, California, where he remained until the time of trial in United States v. Kenneth A. Beaver, on August 12, 1976. It is apparent that the Government knew the location of Mr. Thomas because its Subpoena to Testify issued for Mr. Thomas stated that a Mr. Chamberlain with the Federal Bureau of Investigation in Los Angeles was to be contacted to ascertain Mr. Thomas' location.

The respondent also contends that it did not know that Mr. Thomas had a family or a



child support obligation. However, that assertion by the respondent is unsupported and is directly contradicted by the testimony of Mr. Thomas at the trial in August, 1976. At that trial, Mr. Thomas was specifically asked if there were non-support charges outstanding against him and he responded "Yes". Clearly, the Government was on notice that Mr. Thomas did owe a support obligation to someone and the simplest of investigations would have revealed that the obligation was owed to Patsy Thomas and Gregory Thomas.

Since at least May, 1975, William Thomas has not provided any money or support for the petitioner Gregory Thomas as required by the separation agreement between William Thomas and Patsy Thomas and is required by the laws of North Carolina. Because the United States Government provided William R. Thomas with a new identity and relocated Mr. Thomas and has failed and refused to give the

petitioners information sufficient for them to locate Mr. Thomas and compel him to abide by the provisions of the separation agreement and the laws of North Carolina, petitioners were deprived of support from William R. Thomas and will be deprived of support he owes in the future. (Gregory Thomas will reach 18 years of age on December 21, 1987). Additionally, the United States has not provided or offered to provide Mrs. Thomas or Gregory Thomas with rent or other housing facilities and has not provided or offered to provide any other sums for the health, safety and welfare of Mrs. Thomas and Gregory Thomas, who constitute the family of William R. Thomas as required by §502 of Public Law 91-452.

Following the institution of this action in the United States Court of Claims, the respondent did not answer the petition but filed a motion for summary judgment.

Petitioners attempted, through discovery processes, to obtain facts to support their response to the motion for summary judgment. However, under the rules of the United States Court of Claims and the Order of the United States Court of Claims entered August 23, 1982, the respondent was not required to answer the discovery requests of the petitioners pending a ruling on the motion for summary judgment. Therefore, the motion for summary judgment was heard without a complete factual development.

On September 10, 1982, the United States Court of Claims entered an order granting the respondent's motion for summary judgment on both of petitioners' claims for relief.

#### REASONS FOR GRANTING THE WRIT

The decision below should be reviewed because the United States Court of Claims has decided important questions of federal law which have not been, but should be settled by this Court, has decided federal questions in

way which conflict with the applicable decision of this Court and has so departed from the accepted and usual course of judicial proceedings, as to call for an exercise of this Court's power of supervision.

This Court has not had the opportunity to determine whether the Government's action in aiding an individual to change his or her name, to relocate to another area of the country and to hide from his or her family and creditors, even though authorized under the Witness Protection Program, is a "taking" in violation of the Fifth Amendment. Likewise, this Court has never passed on this question of whether the United States is immune from suit under §502 of Public Law 91-452. In this day, when the Witness Protection Program is undergoing significant criticisms for problems within the program, the Court of Claims has continued in its position that the United States is immune to suit brought under the statute establishing

the Witness Protection Program (§§501-504) of Public Law 91-452. Beyond this, the Court of Claims decision allowed the United States government to interfere with rights regarding domestic relatives which the Constitution reserved to the people and the States. Finally, the Court of Claims, through its rulings which prevent discovery on the Fifth Amendment "taking" issue prior to the Court's decision made it impossible to properly apply this Court's decision. This Court has established that the question of whether there is an unconstitutional taking under the Fifth Amendment is heavily dependent upon the factual setting in which the issue is raised. The Court of Claims by deciding this Fifth Amendment issue in a factual vacuum has thus determined the "taking" issue in a way which conflicts with the applicable decisions of this Court and has so far departed from the accepted and usual course of judicial proceedings as to call for

an exercise of this Court's power of supervision.

I. THE PETITIONERS' PROPERTY RIGHTS HAVE BEEN TAKEN BY THE GOVERNMENT WITHOUT JUST COMPENSATION IN VIOLATION OF THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

The just compensation provisions the Fifth Amendment were designed to bar the Government from forcing some people alone to bear complete burdens which, in all fairness and justice, should be borne by the public as a whole. Armstrong v. United States, 364 U.S. 40 (1960); Penn Central Transportation Co. v. New York City, 438 U.S. 104 (1978). However, this Court has not developed rigid rules or set formulae for determining when justice and fairness require just compensation. Property, Utility and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law, 80 Harv.L.Rev. 1165

(1967); Takings and The Police Power, 74 Yale L.J. 36 (1964). Whether there is a compensable "taking" under the Fifth Amendment thus depends largely upon the particular circumstances of each case. Penn Central Transportation Co. v. New York City, 438 U.S. at 124.

While the Courts have engaged in "essentially an ad hoc factual inquiry", 438 U.S. at 124, certain broad factors have been identified which are relevant in determining whether there has been a "taking" for Fifth Amendment purposes. Thus, in discussing one of its earlier decisions, this Court, in the recent case of Loretto v. Telepromptor Manhattan CATV Corp., 50 U.S.L.W. 4988, 4991 (June 29, 1982) stated that in Penn Central Transportation Co. v. New York City, supra, the "Court explained that resolving whether public action works a taking is ordinarily an ad hoc inquiry in which several factors

are particularly significant - the economic impact of the regulation, the extent to which it interferes with investment-backed expectations, and the character of the governmental action." The question also involves whether the governmental action effects a large number of individuals or whether the economic loss caused by the governmental action falls most heavily on one individual or a small group of individuals. Pennsylvania Coal Company v. Mahon, 260 U.S. 393 (1922); Monongahela Navigation Co. v. United States, 148 U.S. 312 (1893).

The Court of Claims ignored all of these factors and instead engaged in a labelling process by which it found that the governmental action in this case worked a "frustration" rather than an "appropriation". The Court of Claims relied exclusively upon its interpretation of Omnia Commercial Co. v. United States, 261 U.S. 502 (1923) for the



proposition that the Fifth Amendment requires compensation only when there has been an "appropriation of property and not where there has been a "frustration", a proposition which this Court has never embraced.

The Court of Claims' interpretation of the Omnia case was incorrect. In Omnia the plaintiff had a contract to purchase a steel plate from a manufacturer at below market prices. Before the manufacturer could deliver the steel plate, the Government, under the War Powers Clause requisitioned the entire production of the steel manufacturer for its own use. This Court held under old common law precedent that the governmental action voided the contract between the steel manufacturer and its customer. When the Government acted, it made it impossible for the steel manufacturer to perform its contract and thus the contract became void. In the present case, the governmental action did

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not void the contract between Mr. and Mrs. Thomas. The governmental action in no way prevented Mr. Thomas from complying with the contract with Mrs. Thomas. Thus, the contract did not become void. What the governmental action did in this case was make it impossible for Mrs. Thomas to enforce the contract.

If the Court of Claims had properly focused on the broad factors identified by this Court, it would have recognized that there had been a "taking" of the petitioners' property rights in this case. In the present case, the economic impact on the plaintiffs is total. They have been deprived of all of the use of their property rights when the Government made it impossible to enforce their right of support from William R. Thomas. Likewise, the governmental action in this case fell totally on the petitioners. The petitioners are the only individuals who

are owed a duty of support from Mr. Thomas and placing Mr. Thomas in the WPP worked no hardship on any other person. This Court has consistently held that where governmental action falls most heavily on an individual or small group of individuals, a "taking" occurred. Monongahela Navigation Co. v. United States, 148 U.S. 312 (1893); Armstrong v. United States, 364 U.S. 40, 49 (1960). Finally, the governmental action in this case was not carried in the least restrictive means. This court has on several occasions found a "taking" where the governmental action is not reasonably necessary to effectuate a substantial public purpose. See, Nectow v. Cambridge, 277 U.S. 183 (1928); Curtin v. Benson, 222 U.S. 78 (1911). In the present case the Government could have taken steps to insure that the petitioners' property rights were protected and still have placed the witness, William Thomas, under the

protection of the WPP. For instance, the Government could have determined that the witness could be protected even if his new identity and location were made known to the petitioners or the Government could have actually provided support for the petitioners under the provisions of the WPP. Section 502 of Public Law 91-452. However, the Government used neither of these two less restrictive means but instead completely did away with the petitioners' support rights.

While the Court of Claims found in the present case that the governmental action did not make it impossible for Mrs. Thomas to enforce the provisions of the separation agreement, that the "Government merely made it more difficult for the plaintiffs to locate him," (Appendix p. A-5 *infra*), that position of the Court of Claims is ludicrous when the actual facts are examined. The Government gave Mr. Thomas a new identity, removed him from the

Greensboro, North Carolina area and relocated him. The Government now claims that it does not know where he is located because it lost contact with Mr. Thomas sometime ago. If the United States Government, with all of its vast resources, does not know Mr. Thomas' present location, it is ridiculous to believe that the petitioners, who are destitute, would be capable of locating and enforcing the support agreement against Mr. Thomas. Under the facts in this case, it is clear that the governmental action did not just make it more difficult for the petitioners to enforce their support rights against Mr. Thomas but in fact destroyed any ability they had to enforce their property rights.

Thus, it is clear that the Court of Claims did not adhere to the analysis which this Court has prescribed for "taking" cases. When the tests supplied by this Court are followed, it is apparent that petitioners'

property rights were taken and that the Court of Claims decision should be reversed.

II. THE GOVERNMENTAL ACTIONS IN THIS CASE INTERFERED WITH THE PLENARY AUTHORITY OF NORTH CAROLINA OVER DOMESTIC MATTERS IN VIOLATION OF THE NINTH AND TENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

In the present case, the Government's action not only made it impossible for the petitioners to enforce their rights under the separation agreement between Mr. and Mrs. Thomas, but it also made it impossible for the State of North Carolina, acting on behalf of the petitioners, to enforce its laws to require a supporting parent (William R. Thomas in this case) to provide support for his family members. Such control over domestic and family relationships has been left to the states in the Ninth and Tenth Amendments to the United States Constitution. To that end, the legislature of North Carolina has created both civil and criminal sanctions to require a supporting parent or

spouse to provide support for his family members. By removing Mr. Thomas from the family relationship and making it impossible for the State of North Carolina to enforce the support duties owed by Mr. Thomas to his family, the United States Government has interfered with the delicate federal-state balance struck in our Constitution. " . . . Congress may not exercise power in a fashion that impairs the States' integrity or their ability to function effectively in a federal system." Fry v. United States, 421 U.S. 542, 547 n.7 (1975). The United States Government has also forced the State of North Carolina to provide through its welfare programs for the support of Mrs. Thomas and her son, who have been rendered destitute by the failure of her husband to support her and by the actions of the United States which made it impossible for her to enforce the family's support rights against Mr. Thomas.



This Court has not passed on the question of whether under these circumstances the United States can constitutionally interfere with the rights reserved to the States and the citizens. However, the circumstances of this case indicate that there is such a serious interference with the exercise of state sovereignty that the action of the United States in this case cannot constitutionally stand. National League of Cities v. Usery, 426 U.S. 833 (1976).

III. THE UNITED STATES IS SUBJECT  
TO SUIT BY THE PETITIONERS  
UNDER §502 OF PUBLIC LAW 91-452.

The respondent argued and the Court of Claims found that the United States is immune to suit under §502 of Public Law 91-452. This Court has not decided whether sovereign immunity bars claims under the Witness Protection Program. Petitioners contend that the statutes established in the Witness Protection Program do subject the respondent to

suit if the respondent does not comply with the provisions of those statutes. If there is no jurisdiction in the United States Court of Claims for such actions, then there is no place where the petitioners can get a review of the decision of the Attorney General or his designee denying them benefits under the Witness Protection Program. Whether there is jurisdiction for suit under §501, et seq. of Public Law 91-452 or whether petitioners will be denied the opportunity to have any review of the decision of the Attorney General is therefore an important question which this Court should rule upon.

IV. THE PETITIONERS WERE DEPRIVED OF DUE PROCESS OF LAW WHEN THE COURT OF CLAIMS DECIDED THE ISSUES IN THIS CASE WITHOUT ALLOWING THE PETITIONERS TO CONDUCT ANY DISCOVERY.

The determination of whether there has been an unconstitutional "taking" is completely dependent on the facts present in

the case. Penn Central Transportation Co. v. New York City, 438 U.S. 104, 124 (1978).

Thus, a determination of the "taking" issue should not have been made until the petitioners were given an opportunity to develop, through discovery, the full factual basis supporting their claims. However, the Court of Claims by granting respondent's motion to suspend discovery pending a decision on respondent's motion for summary judgment denied petitioners an opportunity to develop the facts necessary to support their "taking" claim and this effectively insured that petitioners' "taking" claim would be denied. A denial of the petitioners' claims without a full and fair hearing denied the petitioners' due process of law.

Petitioners provided the Court of Claims the factual proof available to them, principally through the affidavit of Patsy Thomas

with support attachments. However, petitioners were unable to obtain other necessary information to fully support their claims. For instance, Leonard D. Bogarty, an FBI agent who was principally involved in the case and who had spoken with the petitioners in the past, was denied permission by his supervisors to speak with petitioners' attorney or give an affidavit for use in this action. Petitioners also did not have the information which they sought in their interrogatories submitted to the respondent.

The need for further factual development was apparent because certain facts alleged by the respondent to be true were controverted by the information available to petitioners. For instance, respondent contended that it had no knowledge or information concerning Mr. Thomas' child support obligation but the transcript of the testimony of William R. Thomas at the trial of United States v. Beaver, where Mr. Thomas testified for the

Government, shows clearly that Mr. Thomas stated that there were non-support charges outstanding against him. Likewise, the respondent contends that Mr. Thomas was not placed in the WPP for over a year after he ceased making child support payments. While petitioners do not know how that is relevant, they were able to provide evidence showing that during that entire period he was acting as an informant for the Government and had been relocated by the Government to California. These two examples demonstrate that there were many facts which were yet to be fully developed when the case was decided by the Court of Claims. Petitioners believe they would be able to refute many of the "facts" relied upon by the respondent were they allowed to fully utilize the discovery procedures of the Court of Claims.

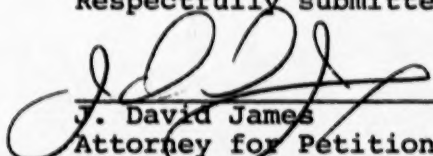
It was thus impossible for the petitioners to get a full and fair hearing on their claims when the Court of Claims

refused to allow them to engage in the discovery procedures otherwise available to litigants in the Court of Claims. Such a denial, in this case where the constitutional issue is so heavily dependent upon a factual development, deprived the petitioners of due process of law.

#### CONCLUSION

For the above reasons, petitioners respectfully contend that a writ of certiorari should issue to review the judgment and opinion of the United States Court of Claims.

Respectfully submitted,



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December 7, 1982

\*The prosecution of this action is sponsored by the North Carolina Civil Liberties Union Legal Foundation, Inc.

IN THE UNITED STATES COURT OF CLAIMS

No. 157-82C

PATSY M. THOMAS and	)	Witness protection
GREGORY RANDALL THOMAS	)	program; suit by wife
by and through his	)	and son of partici-
mother and next	)	pant in program seek-
friend, Patsy M.	)	ing to recover for
Thomas	)	participant's failure
	)	to pay support obli-
v.	)	gation does not state
	)	claim for taking of
THE UNITED STATES	)	other claims within
	)	court's jurisdiction.

---

J. David James, attorney of record, for plaintiff. Norman B. Smith, and Smith, Patterson, Follin, Curtis, James & Harkavy, of counsel.

Margaret E. McCloskey, with whom was Assistant Attorney General J. Paul McGrath, for defendant. Linda Reiman, United States Marshals Service, of counsel.

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Before FRIEDMAN, Chief Judge, NICHOLS and KASHIWA, Judges.

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### ORDER

The plaintiffs, the ex-wife and child of a participant in the government's Witness Protection Program (the "Program"), seek to recover damages from the defendant on the grounds that by placing their husband/father in the Program the government made it impossible for them to collect from him support payments to which they were entitled. The defendant moves to dismiss the petition. We grant the motion.

In 1969, the plaintiff Patsy Thomas and her husband, William R. Thomas, had a child, the plaintiff Gregory Randall Thomas. In June 1974, the couple separated, and in July 1974, entered into a separation agreement in which Mr. Thomas agreed to pay child support. Mr. Thomas paid his support obligation only sporadically until May 1975, when he ceased making payments altogether.

From September 1976 until February 1977, Mr. Thomas participated in the Program.



Following his testimony in several criminal trials, the government relocated Mr. Thomas from the "danger area" of North Carolina. The government also provided Mr. Thomas with subsistence during his participation in the Program. Mr. Thomas never requested, however, that the plaintiffs also be allowed to participate in the Program, and in fact they did not participate.

According to a government affidavit, the government lost contact with Mr. Thomas after May 1977, and has no knowledge of his present location.

The plaintiffs assert two claims. First, they contend that by placing Mr. Thomas in the Program, the government effected a compensable fifth amendment taking of their property rights under the support agreement. Second, they claim that the government violated section 502 of the Organized Crime Control Act of 1970, Pub. L. No. 91-452, tit. V, 84 Stat. 922 (the "Crime

Control Act") by failing to provide for the plaintiffs' "health, safety and welfare."

1. The government seeks dismissal of the plaintiffs' first claim on the ground that the government did not effect a compensable taking of the plaintiffs' property. We agree.

In Omnia Commercial Co. v. United States, 261 U.S. 502 (1923), the plaintiff has a contract to purchase steel plate from a manufacturer at below market prices. Before the manufacturer could deliver the steel plate, the government requisitioned the plate for its own use. The plaintiff sought just compensation for the taking of its contract.

The Supreme Court held that the government had not taken the plaintiff's contract. "As a result of this lawful governmental action [the requisitioning of the steel] the performance of the contract was rendered impossible. It was not appropriated but ended." 261 U.S. at 511. The Court

ruled that "[f]rustration and appropriation are essentially different things" (id. at 513) and that the fifth amendment entitles a property owner to just compensation only for an appropriation. See also Kearney & Treaker Corp. v. United States, Ct.Cl. No. 477-81C, slip op. at 6-7 (decided Sept. 8, 1982); T.O.F.C., Inc. v. United States, Ct.Cl. No. 207-81C, slip op. at 10-11 (decided June 30, 1982).

The present case is an even stronger one for determining that there was no taking. Here, the government's lawful action did not appropriate the plaintiffs' property (i.e., the right to support payments) or make its performance impossible (as was the case in Omnia). The support agreement is still enforceable against Mr. Thomas; by placing him in the Program the government merely made it more difficult for the plaintiffs to locate him.

It is not a relevant distinction (as the plaintiffs suggest) that cases such as Omnia deal with commercial contracts, whereas this case involves a support agreement. In neither situation has the government taken the property involved. The "government may execute laws or programs that adversely affect [but do not appropriate] recognized economic values," without incurring a fifth amendment obligation to compensate the owner. Penn Central Transportation Co. v. New York City, 438 U.S. 104, 124 (1978); see also Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413 (1922). The fifth amendment does not compensate "consequential loss or injury resulting from lawful governmental action." Omnia Commercial Co., 261 U.S. at 510.

The Court of Appeals for the First Circuit recently decided a similar question in Melo-Tone Vending, Inc. v. United States, 666 F.2d 687 (1st Cir. 1981). There the plaintiff sought just compensation from the

United States on the theory that by placing its debtor, Mr. Aver, in the Program, the government made it impossible for the plaintiff to collect on Aver's promissory note reflecting a loan the plaintiff had made to him, and that the government therefore had taken the plaintiff's right to repayment. In affirming the district court's dismissal of the complaint, the court of appeals stated (666 F.2d at 689-90):

We recognize it is not unlikely that the consequential effect of governmental action in carrying out the program may be to delay, or make inconvenient or difficult, plaintiff's enforcement of Aver's financial obligations while he continues in the program. However, the interference here with plaintiff's right to collect and enforce payment of the note cannot be characterized as a taking of its property.

Similarly, the government's "interference here with [plaintiffs'] right to collect and enforce payment of [Mr. Thomas' support obligation] cannot be characterized as a taking of [their] property."

2. The government argues that we do not have jurisdiction over the plaintiffs' second claim, which is that the government violated section 502 of the Organized Crime Control Act by failing to place the plaintiffs in the Program along with Mr. Thomas. We repeatedly have held that since the payment of compensation under the Program is discretionary with the Attorney General, we have no jurisdiction over claims that the Attorney General violated his obligations under the Program by failing to make payment to a participant in the Program. See, e.g., McFarland v. United States, Ct.Cl. No. 45-81C, slip op. at 2 (order of July 28, 1981) (and cases cited therein). We see no reason why the failure of the Attorney General to enroll in the Program the wife and child of a participant is any less a discretionary action, the alleged breach of which does not state a claim within our jurisdiction.

Moreover, it is doubtful that the Attorney General could have enrolled the plaintiffs in the Program. Section 502 authorizes the Attorney General to enroll in the Program "witnesses, and the families of witnesses . . . whenever, in his judgment, testimony from . . . such a witness would place his life or person, or the life or person of a member of his family, . . . in jeopardy." There is no claim that Mr. Thomas' testimony placed the "life or person" of either plaintiff "in jeopardy." The plaintiffs' contention is only that Mr. Thomas' participation in the Program frustrated their efforts to enforce the support order against Mr. Thomas. As we have held, that allegation does not state a claim against the United States over which we have jurisdiction.



The government's motion to dismiss the petition is granted, and the petition is dismissed.

BY THE COURT

/s/ Daniel M. Friedman  
Daniel M. Friedman  
Chief Judge

September 10, 1982



Office-Supreme Court, U.S.  
**FILED**

**FEB 23 1983**

ALEXANDER L. STEVAS,  
CLERK

No. 82-962

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**In the Supreme Court of the United States**

**OCTOBER TERM, 1982**

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**PATSY M. THOMAS AND GREGORY RANDALL THOMAS,  
ETC., PETITIONERS**

**v.**

**UNITED STATES OF AMERICA**

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**ON PETITION FOR A WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS FOR  
THE FEDERAL CIRCUIT (FORMERLY THE  
UNITED STATES COURT OF CLAIMS)**

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**BRIEF FOR THE UNITED STATES IN OPPOSITION**

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### **QUESTIONS PRESENTED**

1. Whether the lawful inclusion of a witness in the United States Marshals Service Witness Protection Program effected a Fifth Amendment taking of the rights of his estranged wife and his child to enforce his child support obligations under a separation agreement.

2. Whether, by enactment of Section 502 of the Organized Crime Control Act of 1970, the United States has consented to be sued for damages to redress the Attorney General's failure to make support payments to petitioners.

3. Whether the inclusion of petitioners' husband and father in the Witness Protection Program impaired state authority over domestic relations in violation of the Tenth Amendment.

4. Whether, by suspending discovery pending a decision on the government's motion for summary judgment, the Court of Claims deprived petitioners of due process of law.

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# **In the Supreme Court of the United States**

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*ON PETITION FOR A WRIT OF CERTIORARI TO  
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**BRIEF FOR THE UNITED STATES IN OPPOSITION**

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## **OPINION BELOW**

The opinion of the Court of Claims (Pet. App. A-1 to A-10) is not reported.

## **JURISDICTION**

The judgment of the Court of Claims was entered on September 10, 1982. The petition for a writ of certiorari was filed on December 8, 1982. The jurisdiction of this Court is invoked under former 28 U.S.C. 1255(1).<sup>2</sup>

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<sup>1</sup>The former Court of Claims' appellate functions were assumed by the new United States Court of Appeals for the Federal Circuit effective October 1, 1982. Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, 96 Stat. 25, 37-38, 57. See note 2, *infra*.

<sup>2</sup>As petitioners observe (Pet. 7), 28 U.S.C. 1255 was repealed effective October 1, 1982, by Sections 123 and 402 of the Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, 96 Stat. 36, 57. Although

### STATEMENT

Petitioner Patsy Thomas and her husband William R. Thomas had a child, petitioner Gregory Randall Thomas, in 1969. The couple subsequently separated and, in July 1974, entered into a separation agreement requiring the payment of child support. William Thomas made support payments pursuant to that agreement only sporadically prior to May 1975. Since that time, Thomas has not provided any support for his son (Pet. App. A-2).

In September 1976, the United States Marshals Service accepted William Thomas (hereinafter "Thomas") into its Witness Protection Program to protect him from retaliation by persons against whom he had testified as a government witness at certain trials.<sup>3</sup> Petitioners did not enter the

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the judgment of the Court of Claims was rendered prior to that date, the petition was not filed until after Section 1255 had been repealed. In addition, none of the provisions of Section 403 of the Federal Courts Improvement Act, which governs the transfer of pending cases from the Court of Claims, appears to address the availability of certiorari review of cases decided prior to October 1, 1982, but not filed in this Court until after that date. Nevertheless, we assume that for purposes of certiorari review this case may be deemed to have been automatically transferred to the new Federal Circuit on October 1, 1982, and that the jurisdiction of this Court may therefore properly be invoked under 28 U.S.C. 1254(1) in the present circumstances.

<sup>3</sup>The Witness Protection Program was established by Sections 501-504 of the Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 933 *et seq.* The statute provides in pertinent part:

Sec. 501. The Attorney General of the United States is authorized to provide for the security of Government witnesses, potential Government witnesses, and the families of Government witnesses and potential witnesses in legal proceedings against any person alleged to have participated in an organized criminal activity.

Sec. 502. The Attorney General of the United States is authorized to rent, purchase, modify, or remodel protected housing facilities and to otherwise offer to provide for the health, safety, and welfare of witnesses and persons intended to be called as

Witness Protection Program; Thomas had never requested that they be included. Pursuant to Witness Protection Program policies, Thomas was relocated from North Carolina, the area of maximum danger for him, and was given a new identity. The government provided a stipend to Thomas until February 1977, when his participation in the Witness Protection Program was terminated. Program files indicate that the Marshals Service has had no knowledge of Thomas' whereabouts since September 1977 (Pet. App. A-2 to A-3; Affidavit of Marilyn Mode, dated May 17, 1982, reproduced at App., *infra*, 1a-2a).<sup>4</sup>

On March 25, 1982, petitioners filed this action in the Court of Claims seeking compensation from the United States. Petitioners alleged that by admitting Thomas to the Witness Protection Program the government had taken their rights to child support payments in violation of the Fifth Amendment and that the government had violated Section 502 of the Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 933, by failing to provide for their health, safety and welfare (Pet. App. A-3 to A-4).

The Court of Claims dismissed petitioners' claims, holding that the government's action did not constitute a compensable constitutional taking of petitioners' property. The court reasoned that the admission of Thomas to the Witness Protection Program did not appropriate petitioners' right to collect and enforce payment of Thomas' support obligation but merely made it more difficult for petitioners to

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Government witnesses, and the families of witnesses and persons intended to be called as Government witnesses in legal proceedings instituted against any person alleged to have participated in an organized criminal activity whenever, in his judgment, testimony from, or a willingness to testify by, such a witness would place his life or person, or the life or person of a member of his family or household, in jeopardy. \* \* \*

<sup>4</sup>The cited affidavit is part of the record (see Pet. App. A-3).

locate him (Pet. App. A-4 to A-7). The court also held that it lacked jurisdiction over petitioners' claim for damages under the Organized Crime Control Act. The court observed that inclusion of individuals and payment of maintenance under that Act are entrusted to the Attorney General's discretion and that petitioners' claim accordingly did not state a cause of action (*id.* at A-8). Moreover, the court expressed doubt whether the Attorney General lawfully could have accepted petitioners into the Witness Protection Program under Section 502 because there was no claim that petitioners were placed in jeopardy by Thomas' testimony (Pet. App. A-9).

#### ARGUMENT

The Court of Claims correctly applied settled law, and its decision presents no conflict with any decision of this Court or any court of appeals. Further review is therefore unwarranted.

1. The gravamen of petitioners' Fifth Amendment claim is that because of Thomas' participation in the Witness Protection Program petitioners have been unable to locate him and thus have been frustrated in their attempt to enforce his child support obligation (Pet. 21-30). As the Court of Claims observed, however, "[f]rustration and appropriation are essentially different things" \* \* \* and the fifth amendment entitles a property owner to just compensation only for an appropriation" (Pet. App. A-5, quoting *Omnia Commercial Co. v. United States*, 261 U.S. 502, 513 (1923)). In *Omnia* the plaintiff claimed that the government had taken its contract right to purchase steel plate from a manufacturer at below market price by requisitioning that supply from the manufacturer before delivery was made. Although the Court recognized that the plaintiffs' rights in the contract constituted a property interest protected by the Fifth Amendment (261 U.S. at 508), it held that the injury to or destruction of the contractual property right did not



effect a taking of the right, but merely frustrated the performance of the contract. *Id.* at 508-514. The Court of Claims properly regarded *Omnia* as controlling here.

Petitioners seek to distinguish *Omnia* on the grounds that "[t]he governmental action [here] in no way prevented Mr. Thomas from complying with the contract with Mrs. Thomas" and did not cause "the contract \* \* \* [to] become void" (Pet. 26). But these circumstances only undercut petitioners' position. The difficulty experienced by petitioners in enforcing the separation agreement is merely "consequential loss or injury resulting from lawful government action [for which] the law affords no remedy." *Omnia Commercial Co. v. United States*, *supra*, 261 U.S. at 510; compare *Armstrong v. United States*, 364 U.S. 40, 49 (1960).<sup>5</sup> In any event, the ruling of the court below is in accord with the only other court of appeals decision that addresses this issue. *Melo-Tone Vending, Inc. v. United States*, 666 F.2d 687 (1st Cir. 1981).

2. The Court of Claims correctly held that it had no authority under Section 502 of the Organized Crime Control Act of 1970, to award damages for the Attorney General's failure to make support payments to petitioners.

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<sup>5</sup>Petitioners argue (Pet. 21-23) that this Court's "Taking Clause" jurisprudence requires consideration of all the circumstances of the particular case, that no single consideration is controlling, and that the Court of Claims' reliance upon the distinction between frustration and appropriation was accordingly error. It is true, of course, that the Court has noted its inability to devise any single formula that answers the taking question for every case. See *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 123-124 (1978). But that is no reason to question the continuing vitality of the doctrine of *Omnia Commercial Co.* The decision in *Penn Central Transportation Co.* itself makes clear that the presence or absence of an "appropriation" or "acquisition" of private resources by the government remains central to the taking inquiry. 438 U.S. at 128. Because the government did not acquire any part of petitioners' contractual interest, but merely made more difficult its exercise, this analysis does not support petitioners' claim.

The controlling principles are fundamental. The United States, as sovereign, cannot be sued without its consent. *United States v. Sherwood*, 312 U.S. 584, 586 (1941). A waiver of sovereign immunity cannot be implied, but must be unequivocally expressed. *United States v. King*, 395 U.S. 1, 4 (1969). Finally, a waiver of sovereign immunity will be found only where the statute in question " 'can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained.' " *United States v. Testan*, 424 U.S. 392, 400 (1976), quoting *Eastport S.S. Corp. v. United States*, 372 F.2d 1002, 1007 (Ct. Cl. 1967).

The language of Section 502 of the Organized Crime Control Act (see pages 2-3, note 3, *supra*) simply does not mandate payment of money to particular individuals in any circumstances, much less in the circumstances of this case. The courts of appeals accordingly have uniformly rejected the claim that Section 502 waives the sovereign immunity of the United States. *Doe v. Civiletti*, 635 F.2d 88, 94 (2d Cir. 1980); *Garcia v. United States*, 666 F.2d 960, 966 (5th Cir. 1982), petition for cert. pending, No. 82-5934 (filed Dec. 22, 1982); see also *Melo-Tone Vending, Inc. v. United States*, *supra*, 666 F.2d at 690. The Court of Claims correctly recognized the absence of a statutory waiver of sovereign immunity, observing that Section 502 vests the Attorney General with broad discretion in choosing individuals to participate in the Witness Protection Program and does not create any enforceable duty to pay compensation (Pet. App. A-8 to A-9).

3. Petitioners next contend (Pet. 30-32) that Thomas' participation in the Witness Protection Program unconstitutionally infringed the State of North Carolina's powers in the area of domestic relations. Petitioners did not raise this Tenth Amendment argument below and should not be permitted to press it here. See *United States v. Lovasco*, 431 U.S. 783, 788-789 n.7 (1977); *Lawn v. United States*,

355 U.S. 339, 362-363 n.16 (1958). Moreover, petitioners lack standing to raise this claim.

Petitioners assert that the federal government unconstitutionally interfered with the power of North Carolina to prosecute Thomas for failure to satisfy his support obligations and has forced the State to provide petitioners with welfare benefits. But as private citizens, petitioners lack a judicially cognizable interest in the prosecution or non-prosecution of another. *Linda R.S. v. Richard D.*, 410 U.S. 614, 619 (1973). Here, as in *Linda R.S.*, the prospect that criminal prosecution by the State would result in Thomas' payment of child support to petitioners is "speculative" (*id.* at 618). Petitioners' lack of standing to raise the Tenth Amendment claim is especially clear, because the right asserted is that of a third party, the State. See *Warth v. Seldin*, 422 U.S. 490, 499 (1975).<sup>6</sup>

In any event, petitioners' Tenth Amendment claim is insubstantial. Neither the enactment of Section 502, nor the approval of Thomas' participation in the Witness Protection Program, "operate[d] to directly displace the States' freedom to structure integral operations in areas of traditional governmental functions" (*National League of Cities v. Usery*, 426 U.S. 833, 852 (1976)). See *In re Glidden*, 653 F.2d 85 (2d Cir. 1981), cert. denied, 454 U.S. 1143 (1982). Furthermore, the authority of the Attorney General to

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<sup>6</sup>The Court has reserved the question whether anyone other than a state or its political subdivision has standing to raise a Tenth Amendment challenge to application of a federal statute. *National League of Cities v. Usery*, 426 U.S. 833, 836 n.7 (1976). Moreover, even if the government's approval of Thomas' participation in the Witness Protection Program infringed some right of the State, that would not support petitioners' claim for damages. It has never been held that a state, much less a private party, may recover damages from the United States for violation of the Tenth Amendment.

arrange for the protection of witnesses does not depend upon the reach of the Commerce Clause. *National League of Cities v. Usery, supra*, and *Fry v. United States*, 421 U.S. 542 (1975), upon which petitioners rely, are accordingly inapposite. See *National League of Cities v. Usery, supra*, 426 U.S. at 852 n.16, 853 n.18.

4. Petitioners' final contention—unsupported by any authority—is that the Court of Claims' suspension of further discovery pending a decision on respondent's motion for summary judgment deprived petitioners of due process of law. This argument, which was not raised below, is without merit because the opinion of the Court of Claims reveals that the court assumed for purposes of deciding the summary judgment motion that the government's action had interfered with petitioners' ability to enforce Thomas' child support obligations (see Pet. App. A-2 to A-7). Additional facts said to be in dispute by petitioners (Pet. 35-36) simply are not material in view of the legal principles that dictated the decision in this case.

#### CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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FEBRUARY 1983



b. Following Mr. Thomas' authorization into the Witness Protection Program, Mr. Thomas was immediately relocated by the United States Marshals Service from North Carolina, the danger area, to a safe location. This relocation occurred in September, 1976.

c. Mr. Thomas was terminated from the Witness Protection Program in February, 1977. From the date of Mr. Thomas' termination in February, 1977 from the Witness Protection Program to the present, Mr. Thomas has received no Government subsistence from the United States Marshals Service. Moreover, Marshals Service records indicate that since September of 1977, Mr. Thomas' whereabouts have not been known by the Marshals Service.

d. At the time of Mr. Thomas' authorization and participation in the Witness Protection Program, the United States Marshals Service had no knowledge or information concerning Mr. Thomas' alleged child support obligation to Patsy Thomas.

/s/ MARILYN MODE

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Marilyn Mode